Filed 2/15/05 P. v. Thao CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

NONG THAO et al.,

Defendants and Appellants.

F045274

(Super. Ct. No. F03902789-7)

OPINION

APPEAL from judgments of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

William Davies, under appointment by the Court of Appeal, for Defendant and Appellant Nong Thao.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Phia Vang.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Nong Thao (Thao) and Joseph Phia Vang (Vang) were both charged with the murder of Yang Xiong (Pen. Code, § 187, subd. (a)).[1] Defendants eventually entered plea bargains. Thao pled no contest to voluntary manslaughter (§ 192, subd. (a)) and admitted a gang enhancement (§ 186.22, subd. (b)(1)) in consideration of a maximum sentence of 13 years. At sentencing, the court struck the gang enhancement, and sentenced Thao to the aggravated term of 11 years.[2] Vang, who pled no contest to second degree murder, was sentenced to a term of 15 years to life, and received a $10,000 restitution fine (§ 1202.4) and a suspended $10,000 parole revocation fine (§ 1202.45).

On appeal, Thao contends the court's imposition of the upper term violated *Blakely v. Washington* (2004) 542 U.S.____ [124 S. Ct. 2531]. Vang contends the court's imposition of the restitution and parole revocation fines violated *Blakely* and the terms of his plea agreement. We affirm.

DISCUSSION

Blakely error

Apprendi v. New Jersey (2000) 530 U.S. 466 (*Apprendi*) held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) *Blakely* held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose based *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may

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1 Further statutory references are to the Penal Code unless otherwise noted.

2 Aggravating factors the court found were that (1) the crime involved gang participation; (2) the crime involved callous and vicious conduct; (3) the defendant was armed; (4) the defendant induced others to participate in the commission of the crime; and (5) the crime was carried out in a manner which indicated sophistication. (Cal. Rules of Court, rule 4.421(a)(1), (2), (3), (4), & (8).)

impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 542 U.S. ___, ___ [124 S.Ct. 2531, 2537].)

Even if *Blakely* applies to California's determinate sentencing scheme and Thao has not waived the issue by failing to object or to obtain a certificate of probable cause, as the People contend, we find the court did not violate *Blakely* in imposing the upper term. Under California law, once a jury finds *or the defendant admits* the existence of a single aggravating factor, the maximum sentence a judge *may* impose is the upper term. (§1170, subd. (b); *People v. Osband* (1996) 13 Cal.4th 622, 730.) *Apprendi* and *Blakely* do not preclude the exercise of discretion by sentencing courts so long as the sentence imposed is within the range to which the defendant was exposed by his admissions. (*Blakely*, *supra*, 124 S.Ct. at p. 2541.) That is the case here. By admitting the gang enhancement as part of his plea agreement, Thao, in effect, admitted his conduct was sufficient to support one of the aggravating factors found by the court, namely, gang participation, and thus sufficient to expose him to the upper term of 11 years for voluntary manslaughter. A sentence within the maximum allowed by the facts defendant admitted does not violate *Blakely*.

As for Vang's assignment of error, we simply find no support in *Blakely*, nor has Vang cited applicable authority, for his assertion that the court's imposition of restitution and parole revocation fines in the amount of $10,000 was erroneous "because there was no jury trial on these amounts." Therefore, we reject it on this ground.

Fines and the plea agreement

Vang also contends the court erred in imposing the restitution and parole revocation fines under sections 1202.4 and 1202.45 because they "were not part of the plea bargain and the total … exceeded the amount specified in the plea bargain." We disagree. It appears from the record of the plea proceedings that Vang implicitly agreed that the imposition and amount of the statutory fines would be left to the discretion of the sentencing court.

The record discloses that during the change of plea hearing, Vang expressly acknowledged the court's admonishment he could be fined up to $10,000, and his plea form stated he understood he could "be fined up to $10,000 and ordered to pay restitution, a minimum of $200, and up to $10,000." The probation report further notified Vang he was facing a fine of $10,000 under section 1202.4 and a like amount under section 1202.45. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 74-75 [probation report notified the defendant that reimbursement of attorney fees was sought].) If imposition of the $10,000 fines violated Vang's plea bargain, Vang or his attorney could be expected to have objected at sentencing. (*Id*. at p. 75.) However, the fines were imposed without objection. These circumstances support our conclusion that the amount of the statutory fines would be left to the court to decide and their imposition was not a violation of the plea agreement. In light of this conclusion, the People's pending motion to dismiss Vang's appeal, on the ground he waived his appellate rights as part of his plea bargain, is moot.

DISPOSITION

The judgments are affirmed.

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Buckley, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Levy, J.